No. 84-1567

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST, and WOODWARD SAND COMPANY, INC.,

Appellants,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District Of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. By requiring payments of "withdrawal liability" to a multiemployer pension trust from an employer who has no further contractual obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980 [29 U.S.C. § 1381(a), *et seq.*] take the private property of the employer for the private use of the pension trust in violation of the Taking Clause of the Fifth Amendment of the United States Constitution?

2. If the property taken from the employer by § 1381(a) is for a public use, is the property taken without just compensation in violation of the Taking Clause of the Fifth Amendment of the United States Constitution?

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No. _____

IN THE

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OCTOBER TERM, 1984

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST, and WOODWARD SAND COMPANY, INC.,

Appellants,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District Of California

JURISDICTIONAL STATEMENT

Woodward Sand Company, Inc., (hereinafter referred to as the "Employer" or "Woodward Sand"), joins the Trustees of the Operating Engineers Pension Trust (hereinafter referred to as

"Trustees")[1] in appealing from the Judgment of the Three Judge Court convened in the United States District Court for the Central District of California, entered on December 4, 1984. The Three Judge Court denied a permanent injunction, *inter alia*, against enforcement of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ("MPPAA"), holding that MPPAA is constitutional on its face.

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[1] The list of all parties below is as follows: John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Meyer, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, plaintiffs; Pension Benefit Guaranty Corporation, a nonprofit corporation established within the Department of Labor of the United States of America, defendant; Woodward Sand Company, Inc. ("Woodward Sand"), Penfield & Smith, Inc. ("Penfield & Smith"), Roy L. Klema Engineers, Inc. ("Klema Engineers"), (improperly named as Klema Engineering, Inc.) and Municipal Engineers, Inc. ("Municipal Engineers"), plaintiffs-in-intervention. Penfield & Smith, Inc., Roy L. Klema Engineers, Inc., and Municipal Engineers, Inc., are not parties to this appeal, and are designated as appellees under Supreme Court Rule 10.4. Penfield & Smith, Klema Engineers, and Municipal Engineers are not joining in the appeal by Woodward Sand because the Trustees have now agreed that, as a result of a recent statutory change in the effective date of MPPAA, these three employers have incurred no liability under MPPAA.

Woodward Sand Company, Inc. also does business as Woodward Sand and Materials Company, and as Woodward Organic Products Company.

OPINION BELOW

The Three Judge Court entered its Order Granting Summary Judgment to Defendant on May 2, 1984. The Order is not officially reported, and is reproduced in the appendix at page A-1.[2]

JURISDICTION

A Three Judge Court was properly convened under 28 U.S.C. § 2282 because a permanent injunction was sought against enforcement of a federal statute on constitutional grounds.[3] The Judgment of the Three Judge Court denying, *inter alia*, a permanent injunction against enforcement of MPPAA and rejecting the Employer's constitutional claims was entered on December 4, 1984.[4] The Employer timely filed its Notice of Appeal with the Three Judge Court on January 31, 1985. 28 U.S.C. § 2101(b). This Court has jurisdiction over this appeal under 28 U.S.C. § 1253 as an "appeal to the Supreme Court from an order . . .

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[2] Other earlier opinions below that predate the Employer's involvement in this case are set forth in the Trustees' Jurisdictional Statement.

[3] This action was commenced on June 17, 1975. Congress repealed 28 U.S.C. § 2282 in 1976. Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. However, Section 7 of the Act is a savings clause which provides that cases filed prior to August 12, 1976 are not affected by the repeal. This case must, therefore, be treated as if § 2282 were still applicable. *See Connolly v. PBGC*, 673 F.2d 1110, 1113-14 n.1 (9th Cir. 1982); *Smith v. Ehrlich*, 430 F.Supp. 818, 819 n.1 (D.D.C. 1976); 12 Moore's Federal Practice ¶ 426.02.

[4] The Pension Benefit Guaranty Corporation ("PBGC") filed a motion to alter or amend the judgment on December 17, 1984, seeking clarification as to whether the Three Judge Court intended to award attorneys' fees to the PBGC as part of the award of costs. On the same date, the PBGC filed a separate motion for attorneys' fees. The order of the Three Judge Court denying both of the PBGC's motions was entered on March 18, 1985.

denying . . . [a] permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.'"[5]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The portion of the Fifth Amendment at issue in this appeal is as follows:

> "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. V.

The statutory provisions challenged by the Employer are contained in the Multiemployer Pension Plan Amendments Act of 1980, which enacted Part 1, Subtitle E, Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1381-1405. The essential provisions are as follows:

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[5] In the lower court's Order Granting Summary Judgment to Defendant, the court acknowledged that the case was an action "seeking to *enjoin*" an act of Congress. Appendix at page A-2 (emphasis added). The lower court's Order, and Judgment, make clear that the summary judgment motion of the Employer was being denied in its entirety. This Court has held that as long as a three-judge court has indicated it is denying all relief sought by plaintiff, the Court *does* have appeal jurisdiction under 28 U.S.C. § 1253, even if the lower court does not specifically state tht it is denying injunctive relief. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 541 n.5 (1972). The Employer sought injunctive relief in its complaint-in-intervention, and in its motion for summary judgment. By denying that motion, the lower court also denied, at least implicitly, the request that the court enjoin enforcement of MPPAA.

"If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a).

"When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall--

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer." 29 U.S.C. § 1382.

STATEMENT OF THE CASE

The Employer is engaged in the construction industry in Southern California in the building materials supply business. Until 1980, the Employer was a member of a multiemployer bargaining group that negotiated with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), and was signatory to collective bargaining agreements with Local 12. As part of such collective bargaining agreements, the Employer agreed to contribute for each employee a negotiated amount per hour worked to the Operating Engineers Pension Trust ("Pension Trust") and to abide by the terms of a written agreement ("Trust Agreement") executed by certain employers and Local 12 in 1960 to create the Pension Trust. The Trustees administer the Pension Trust.

The Trustees have the exclusive right to set or change benefit levels and decide how the Pension Trust's assets are invested. The Trust Agreement at all times has specified that the liability of any contributing employer to the Pension Trust is strictly limited to the payments required by the collective bargaining agreement the employer has signed. The Trust Agreement specifies further that no contributing employer is liable to provide the benefits established by the Trustees if the Pension Trust does not have the assets to make such benefit payments.

Notwithstanding the fact that under the Trust Agreement and applicable collective bargaining agreements contributing employers only promised a set contribution, not a set benefit level, the Pension Benefit Guaranty Corporation ("PBGC") ruled in 1975 that the Pension Trust was a "defined benefit plan," not a "defined contribution plan," and that the Pension Trust therefore fell under the PBGC's regulatory jurisdiction and was liable to the PBGC for certain insurance premiums. The Trustees then filed this action against the PBGC on June 17, 1975, seeking in part declaratory and injunctive relief for violation by the PBGC of the Fifth Amendment.[6]

In early 1980, the Employer timely sent Local 12 notice of its termination of the then current collective bargaining agreement and notice of its intention to negotiate with Local 12 separately and directly, independent of the multiemployer bargaining group. The Employer and Local 12 reached impasse in the negotiations in September of 1980 (although this date is in dispute), thus ending any obligation of the Employer to contribute to the Pension Trust. The Employer paid all contributions and satisfied all obligations required by the Trust Agreement for the time before impasse was declared and its obligation to contribute to the Pension Trust ceased.

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[6] The extensive subsequent procedural history of this case, occurring before the Employer intervened, is set forth in the Trustees' Jurisdictional Statement.

On September 26, 1980, Congress enacted MPPAA, which requires that upon an employer's "withdrawal" from a pension trust, the trustees must calculate the amount of the pension trust's total unfunded vested benefits, allocate a portion thereof to the withdrawing employer, and demand payment of that amount as "withdrawal liability." The statute was made retroactive to apply to employers who had entered into agreements to contribute to pension trusts prior to MPPAA's enactment, and who had no opportunity to withdraw prior to passage of the statute. Thus, despite specific contractual provisions among contributing employers, Local 12 and the Pension Trust strictly limiting the amount of employer contributions to the amounts set forth in the collective bargaining agreement, and despite full compliance with those provisions by the employers, MPPAA requires a withdrawing employer to contribute substantial additional sums to the Pension Trust to make up for unfunded vested benefits at benefit levels set solely by the Trustees.

In accordance with MPPAA's requirements, the Pension Trust has demanded from the Employer payment of a substantial sum for withdrawal liability.[7]

By direction of the Ninth Circuit, the district court in this case requested that a Three Judge Court be convened on June 21, 1982, to determine the constitutional challenges and request for injunctive relief originally raised by the Trustees. Because MPPAA was

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[7] Originally the respective demands for withdrawal liability were as follows: Woodward Sand, $264,524.24; Penfield & Smith, $210,872.37 and Klema Engineers, $118,701.86. The withdrawal liability for Woodward Sand was later reduced to $201,751.38 in an arbitration which determined that the Pension Trust's return on investment assumption was unreasonably low. Even this reduced amount of withdrawal liability, however, represents nearly 25 percent of Woodward Sand's net worth. The withdrawal liability demanded from Penfield & Smith represented approximately 32 percent of its net worth, and the withdrawal liability demanded from Klema Engineers represented approximately seven times its net worth.

enacted during the course of this action, the Trustees filed an amended complaint challenging MPPAA as well. The Employer sought leave to intervene, which was granted by an Order entered on December 15, 1982, and subsequently filed a complaint in intervention on February 10, 1983.

The complaint in intervention seeks a declaration that: (1) MPPAA violates the Fifth Amendment by taking the property of withdrawn employers for the private use and benefit of the Pension Trust and, even if such taking is determined to be for a public use, does so without just compensation; and (2) MPPAA violates the Fifth Amendment by taking the property of withdrawn employers without due process of law. The complaint in intervention also seeks a permanent injunction against the enforcement of MPPAA.

The Trustees and the Employer filed motions for summary judgment on May 13 and 16, 1983, respectively. By order entered on May 2, 1984, the Three Judge Court denied the motions for summary judgment, holding that MPPAA was constitutional on its face and denying injunctive relief. Regarding the Taking Clause issue, the Three Judge Court concluded that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the takings clause," and that therefore it was not necessary to decide whether a taking occurred, whether any such taking was for a private or public purpose, or whether any such taking was with just compensation. Regarding the Due Process Clause issue, the Three Judge Court concluded that MPPAA is founded on a rational basis.

ARGUMENT

THE COURT SHOULD NOT DECIDE THIS DIFFICULT AND IMPORTANT CASE WITHOUT FULL BRIEFING AND ARGUMENT

This Case Poses Substantial Constitutional Issues Not Previously Considered By This Court Concerning The Application Of The Taking Clause Of The Fifth Amendment To The United States Constitution To The Multiemployer Pension Plan Amendments Act Of 1980 (MPPAA).

A. The District Court Erroneously Concluded That Money and Contractual Rights and Expectations Do Not Constitute "Property" For Purposes Of The Taking Clause.

This action presents to the Court for the first time the question of the applicability of the protections of the Taking Clause of the Fifth Amendment, U.S. Const. amend. V, to the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*[8] MPPAA requires employers withdrawing from a private union multiemployer pension trust to pay the trust a sum constituting "withdrawal liability."

The Taking Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Clause precludes government taking of

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[8] In *PBGC v. Gray & Co.*, ____ U.S. ____, 81 L.Ed.2d 601 (1984), the sole question before the Court was whether the retroactive application of MPPAA to withdrawals which occurred prior to the enactment of MPPAA violated the Due Process Clause of the Fifth Amendment. No Taking Clause argument was presented or considered by the Court, and the Court did not address the constitutionality of MPPAA as applied to withdrawals occurring after the enactment date. *Id.* at 610 n. 7.

private property for private use, *see Hawaii Housing Authority v. Midkiff*, 467 U.S. ____, 104 S. Ct. 2321 (1984), and guarantees just compensation to a property owner whose property is taken by the government for a public use. The question of whether these constitutional tenets are violated by MPPAA's withdrawal liability requirements is substantial, is being litigated across the country, and is worthy of consideration by this Court.

The Three Judge Court's conclusion that no "property" was involved in this case disregards the fact that application of the Taking Clause is not limited to real property or to physical, tangible items, but rather has been applied to a variety of intangible interests which this Court has regarded as "property" for Taking Clause purposes. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. ____, 104 S.Ct. 2862 (1984) (recognizing a Taking Clause property interest in a trade secret); *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman's lien protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). As early as 1945, the Court recognized that

> It is conceivable tht ["property" as used in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945). The Court has also implicitly recognized that money may qualify as private property for Taking Clause purposes. *See Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953) ("[s]o long as a railroad is not caused by such regulations to lose money on its overall business, it is hard to think that it could successfully charge that its property was being taken for public use 'without just compensation'").

B. MPPAA Violates The Taking Clause Of The United States Constitution By Taking An Employer's Property And Giving It To A Private Pension Trust For Its Private Use.

In this case, money is being taken from private companies such as Employer and transferred to private union trust funds for distribution to private employees. This withdrawal liability must be disclosed in financial statements and applications for loans, lessening the employers' credit worthiness,[9] and severely impairing the ability of employers to operate or sell their businesses. Moreover, companies such as Employer reasonably relied on the fact that their liability for pension plan contributions would be limited to the specific amounts bargained for in their labor contracts, with the possibility of minor deviations due to regulatory changes. The employers have allocated their assets and done their business planning based on such justified reliance. With the enactment of MPPAA, however, the companies find that the contractually specified contribution determined as part of a negotiated compensation package is no longer in force. Rather, Congress has gone far beyond making a minor regulatory change, and has deprived them of their contractual rights and expectations, and substantial

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[9] A United States District Court has stated that a withdrawal liability claim, "whether valid or not, sends a signal to people in the industry that the company is out of business." *T.I.M.E. - DC, Inc. v. Trucking Employees of New Jersey Welfare Fund, Inc.*, 560 F.Supp. 294, 304 (E.D.N.Y. 1983).

monetary sums, without regard for the private property protections of the Fifth Amendment.

MPPAA in effect requires private citizens (employers) to transfer private property (money) to another private party (a union pension trust) in derogation of the contractual rights and expectations of the parties. The funds at issue are distributed solely to contractually identified pension plan participants and beneficiaries, and not to the public at large. As discussed above, the economic impact of this taking is substantial, since the withdrawal liability claim against the deprived party may exceed the employer's net worth as a going concern. The employer's "reasonable investment-backed expectation" is that, after paying his just debts and fully performing his contract obligations, his property will remain his own, free of governmental action requiring its transfer to another party. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. ____, 104 S.Ct. 2862, 2875 (1984) (whether a governmental action effects a "taking" involves factors including "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.")

C. MPPAA Violates The Taking Clause Of The United States Constitution Because It Does Not Provide Just Compensation To The Employers Whose Property It Takes.

The public purpose rationale offered by Congress does not transform this unconstitutional taking into a permissible act. A taking for a public purpose is unconstitutional if performed without payment of just compensation. If Congress wishes to reduce the unfunded vested benefits liability of union multiemployer pension funds, it is empowered to appropriate and spend money for that public purpose. Alternatively, it may limit the discretion of pension plan trustees to increase benefits without regard to contribution levels. It may impose "guaranty"

requirements on employers entering into *future* pension plans whose contractual rights and expectations would not be destroyed. The Fifth Amendment's Taking Clause, however, "[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Congress may not, consistent with this constitutional provision, take the money and contractually-based rights and expectations of employers without affording them just compensation.

CONCLUSION

For the reasons stated above, Appellant submits that this appeal brings before this Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution, and that this Court should therefore note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

JOHN L. CONNOLLY, ET AL., ETC.,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, ETC.,

Defendant.

WOODWARD SAND CO., INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.

Plaintiffs in Intervention.

NO. CV-75-2037-DWW

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

Before: NELSON, Circuit Judge, and WILLIAMS and KELLEHER, Senior District Judges.

Plaintiffs, as trustees, ("Trustees") of the Operating Engineers Pension Trust ("Pension Trust"), a joint labor-management employee benefit trust created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 [29 U.S.C. § 186(c)(5)], seek summary judgment against defendant Pension Benefit Guaranty Corporation ("PBGC") to the effect that certain

provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), violate the Constitution of the United States. In particular, the Trustees contend that the provisions of the MPPAA imposing "withdrawal liability" on employers who ceased participation in the Pension Trust violate the fifth amendment of the Constitution by requiring private property to be transferred from one party to a second party for the second party's private use and benefit. In addition, the Trustees contend that the provisions of ERISA, as originally enacted and amended, requiring payments of "premiums" by the Pension Trust to PBGC, failed to accord the due process of law guaranteed by the fifth amendment.

Actions seeking to enjoin the operation of acts of Congress were, until 1976, required to be heard by district courts with three judges on the panel. Since this lawsuit was begun in 1975, it is properly before this three-judge court. *Connelly v. Penson* [*sic*] *Benefit Guaranty Corp.*, 673 F.2d 1110, 1113-14 n.1 (9th Cir. 1982).

There are no factual issues in dispute in this case. The date of intervenors' withdrawal from the pension plan is not relevant because intervenors do not challenge the retroactive application of the MPPAA. Such a challenge was rejected in *Shelter Framing Corp. v. Penson* [*sic*] *Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), *prob. juris. noted sub nom PBGC v. R.A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 18, 1983) (hereinafter "*Shelter Framing*"). Moreover, this lawsuit challenges the facial constitutionality of Title IV and the MPPAA and does not challenge the statute as applied to particular persons. Hence, allegations regarding the particularized impact of the challenged legislation on the parties' individual situations are of little relevance. We find that no triable issues of fact exist and, for the reasons set forth below, grant defendant's motion for summary judgment.

BACKGROUND

In 1974, Congress attempted to regulate pension plans in a comprehensive manner.[1] To do so, it enacted the Employee Retirement Income Security Act. Title IV of ERISA was adopted to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds. To achieve this goal, it established a system of termination insurance. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980). This termination insurance program is run by the PBGC. The PBGC is a governmental entity which receives no direct federal appropriations. Instead, it relies primarily on premium payments from private parties to insure against the failure of pension funds.

Upon enactment of ERISA in 1974, the PBGC immediately insured the receipt of all "non-forfeitable benefits" that had been earned by employees in single employer plans. A single employer who wished to terminate his plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a) (1976). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "non-forfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at § 1341(c), (b).

Multiemployer plan benefits, in contrast, were not insured unconditionally upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guaranties [*sic*] were to become mandatory. *Id.* at 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See*

Connolly v. Pension Benefit Guaranty Corp., 581 F.2d 729, 734 (9th Cir. 1978); 126 Cong. Rec. 12,179 (1980) (remarks of Rep. Biaggi). Moreover, Congress was concerned about the potential costs of such a program. Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time, Congress ordered the PBGC to prepare a comprehensive report analyzing the multi-employer situation.

After extensive consideration, the MPPAA was enacted, affecting a variety of major changes in ERISA. Under the MPPAA, the PBGC is required to guarantee certain benefits of covered multi-employer plans. The level of benefits guaranteed by the PBGC under the MPPAA is lower than the level guaranteed prior to the passage of the MPPAA. The premiums employers must pay the PBGC for insurance are significantly higher under MPPAA. The PBGC is also authorized to provide financial assistance to plans which cannot meet their current financial obligations. This permits a plan which is having financial difficulties to continue, and allows employers to continue making contributions to an insolvent plan without incurring liability under ERISA. Under the MPPAA, the insurable event for a plan is its insolvency, rather than its termination. The MPPAA further provides that the plan benefits are to be funded over a shorter period of time than formerly required and requires arbitration to resolve a wide variety of disputes between trustees and employers. Plaintiffs raise a number of constitutional challenges to the provisions of Title IV and the MPPAA.

DISCUSSION

A. THE TAKINGS CLAUSE.

Plaintiffs argue that contractual provisions creating investment backed expectations constitute compensable property rights just as

much as actual ownership of property. Relying primarily on the recent Ninth Circuit case of *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted*, 52 U.S.L.W. 3342 (November 1, 1983), they argue that employers would normally be required to liquidate other property, such as land, to pay withdrawal liability claims.

Midkiff, on its face, suggests that it does not control the case before us. *Midkiff* insists that if it had been reviewing "a *congressional* determination that there was a public use, not . . . a state legislative determination," it might have reached a different result. 702 F.2d at 798. State legislative pronouncements, *Midkiff* concludes, are entitled to less deference than Congressional determnations. [*sic*] *Id.* Since the case before us, unlike *Midkiff*, involves a congressional finding, we could merely cite this analysis and move on. We choose not to do this, however, because to do so would be to endorse the *Midkiff* logic.

The *Midkiff* analysis seems inconsistent with what little Supreme Court precedent is available. The Supreme Court has never written that state legislative determinations are entitled to less deference than congressional determinations. To make it seem otherwise, *Midkiff* culls sentences from two unrelated cases, written 15 years apart, and stands them in juxtaposition. Thus, it offers this statement:

> when *Congress* has spoken on the subject 'Its decision is entitled to deference until it is shown to involve an impossibility'

T.V.A. v. Welch, 327 (1925) U.S. 546, 552 (1946), *quoting Old Dominion Land Co.*, 269 U.S. 55, 66 (1925), in contrast with this one:

> where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one."

Cincinnati v. Vester, 281 U.S. 439, 446 (1930), and concludes that

state legislative findings are accorded little deference. 702 F.2d at 798. The Supreme Court did not intend, in either of these cases, to draw a line between state and federal legislative judgments. In fact, the quotation from *Vester* is equally applicable to Congress, and that from *T.V.A.* equally applicable to the states. Thus, *Midkiff* has created a distinction that the Supreme Court has never recognized and has, in fact, implicitly rejected. *E.g., Berman v. Parker*, 348 U.S. 26, 31-32; *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680 (1896).

Moreover, common sense suggests that state legislative determinations, if they are to be treated differently than congressional determinations, should be granted more, not less, deference. The tenth amendment reserves power to the states. To at least one commentator, "it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a state." Conahan, *Hawaii's Land Reform Act: Is It Constitutional?* 6 Hawaii B.J. 31, 37 (1969). Thus, the distinction drawn in *Midkiff* between state and federal legislative findings seems an unlikely one.

The *Midkiff* distinction, however, is unnecessary to our holding here because we find that no "property" was involved in this case. Traditionally, it has been understood that to make a claim under the takings clause, the claimant must prove that "property," in the sense of "the group of rights inhering in the citizen's relation to [a] physical thing," has been "taken." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). There has been no "set formula" which the Supreme Court has evolved to determine when "'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . ." Rather, the Court has examined the "taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action -- that have particular significance."

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

We find that the contractual right which insulates employers from further liability to the pension plans in which they participate is not "property" within the meaning of the takings clause. Although contractual rights may constitute property, *see Lynch v. United States*, 292 U.S. 579 (1934), they must be very explicit to do so. In both *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the parties sought to protect interest in real property. Here, in sharp contrast, we are asked to protect a mere contractual arrangement. The importance of this distinction was reaffirmed by the Supreme Court in the recent case of *Security Industrial Bank v. United States*, ____ U.S. ____, 103 S. Ct. 407 (1983). Since appellants are unable to identify any interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans to which they participate, we find no property at issue in this case. We refuse to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause. Accordingly, we find no constitutional violation. *See Peick v. Pension Benefit Guaranty Corporation*, No. 82-2081, slip op. at 53 (7th Cir. Dec. 19, 1983); *Dorn's Transportation Inc. v. I.A.M. National Pension Fund, Benefit Plan A*, No. 82-1141 (D.D.C. January 19, 1984) (hereinafter "*Dorn's*"); *Speckman v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469, 472-73 (E.D. Mo. 1983). Since we resolve this issue on the basis of our finding that no "property" is affected by the MPPAA, we need not reach the questions whether a taking occurred or whether such a hypothetical taking would be for a public purpose.

B. DUE PROCESS ANALYSIS.

If they do not affect property, provisions of Title IV and the MPPAA may yet be unconstitutional if they are not grounded in a rational basis. Plaintiffs argue that Title IV and the MPPAA achieve the reverse of their intended results. Specifically, Title IV and the MPPAA increase pension plan terminations and disrupt pension plans in general. Thus, plaintiffs argue, these statutes fail the rational basis test.

The burden of proof is on the challenging party to prove that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). Since the due process challenge here involves only economic rights in general, this court merely must determine whether the statutes bear a rational relationship to their legitimate ends. *United States v. Carolene Products*, 304 U.S. 144 (1938); *Beller v. Middendorf*, 632 F.2d 788, 807-08 (9th Cir. 1980). We find that both Title IV and the MPPAA are founded in rational bases.

To assess the constitutionality of the withdrawal liability provisions of the MPPAA, we must apply the analysis first set forth by the Seventh Circuit in *Nachman Corp. v. PBGC,* 592 F.2d 947, 960-63 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980) (hereinafter "*Nachman*"). *See Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.*, No. 83-7004 (2d Cir. Jan. 9, 1984) (hereinafter "*Textile Workers*"). Although much of the *Nachman* analysis is derived from contract clause considerations, those considerations are applied to the federal government through the due process clause. *See Shelter Framing*, 705 F.2d at 1510-11; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983). *But see Dorn's*, slip. op. at 16. After pointing out that rationality is determined by comparing the identified problem to the nature and scope of the burden imposed to remedy it, the *Nachman* court considered four separate factors: 1) the reliance interest of the parties affected; 2) whether impairment of the private interest is

effected in an area previously subjected to regulatory control; 3) the equities of imposing the legislative burdens; and 4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. The court emphasized that these four factors were only to be used to determined [*sic*] whether the legislation represented a rational means to a legitimate end, but were not to be used to express judicial approval or disapproval of the balance struck by Congress. *See id.* We address each of these four factors in turn.

First, we must analyze the reliance interest of the parties affected by the statute. Intervenors insist that they have relied on a basic contractual agreement that they will not have to pay more to the pension plan than their original required contributions. In *Nachman*, the court found that the employees' reliance on receiving their vested benefits outweighed the employer's reliance on its ability to terminate its obligations without continuing liability. Concededly, *Nachman* involved a single employer plan, while the instant case involves multiemployer plans where the participants do not have specific promises from their own employers to pay their pension benefits. "It is nonetheless reasonable and fair to conclude that plan participants did expect their employers to continue making contributions necessary to support these expected benefits." *Textile Workers*, slip op. at 943. We conclude that the employers' reliance in their business dealings on their collective bargaining agreements is offset by employees' reliance in their personal affairs on obtaining vested pension benefits. The first *Nachman* factor does not weigh decidedly in favor of either party in this lawsuit.

The second *Nachman* factor is whether impairment of the private interest is affected in an area previously subjected to regulatory control. We find this factor to weigh heavily against the employers here. In *Nachman*, the court wrote that since plan terminations had previously been subject to federal regulation, an employer's expectation that it would not have to fund its plan's vested benefits could be given less weight by Congress. 592 F.2d at

962. In that case, the presence of Internal Revenue Service regulations governing plan terminations mitigated *Nachman's* claim of surprise when ERISA was enacted with termination liability provisions. *Id.* at 962, n.33. "Just as the employer in *Nachman* was charged with constructive notice that its rights might someday be subject to congressional regulation, so too were plaintiffs here. Notice was everywhere." *Textile Workers*, slip op. at 945; *see Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1512 (9th Cir. 1983) ("Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974."). Before the employers decided to close their operations, there had been decades of pre-MPPAA regulation of multiemployer plans under a variety of federal labor and tax laws. *See Peick*, 539 F. Supp. at 1044. "The enactment of ERISA in 1974 provided a comprehensive regulatory scheme mandating employer withdrawal liability in the single employer context." *Textile Workers*, slip op. at 945. This "afforded clear warning tht the federal government might one day act again and further buttress the legislative scheme it had created." *Peick*, 539 F. Supp. at 1044-45. (footnote omitted). Unlike *Shelter Framing*, we are not here addresing [*sic*] the effect of "legislative changes which extract a heavy fine for action taken *before* the changes win congressional approval." 705 F.2d at 1512 (emphasis added). Here, of course, the actions are taken *after* congressional approval. We find that the MPPAA's effect was not completely unexpected, and that Act operated in an area that Title IV had previously regulated. The second *Nachman* factor therefore favors the constitutionality of the MPPAA.

The third *Nachman* factor involves weighing the equities of imposing the burden of withdrawal liability on the employer. Here, intervenors insist that the MPPAA has radically changed the pension plan "ground rules" and unfairly burdens employers who withdraw from pension plans.

When drafting the MPPAA, Congress was forced to determine who should bear the burden of any shortfalls in a multiemployer

plans [*sic*]. We cannot find it unreasonable for Congress ultimately to decide to require the withdrawing employers to bear their share of the burden of funding, rather than to leave the remaining employers "holding the bag." *See* 126 Cong. Rec. 20,234 (1980) (remarks of Senator Matsunaga).

The MPPAA itself clearly demonstrates that Congress did not place the entire burden of underfunding on the withdrawing employers. *Textile Workers*, slip op. at 947. Congress, for instance, required employers to make higher minimum contributions than under ERISA, 29 U.S.C. § 1423 (Supp. V 1981); the PBGC's insurance premiums were increased, *id.* § 1306; funds were made available to supplement plan assets so that insolvent plans could continue to operate with reduced benefit payments and without requiring prohibitively high employer contributions, *id.* § 1431; participant's benefits were made subject to limited reductions in financially troubled plans, *id.* § 1426; and the PBGC's guarantee was reduced, *id.* § 1322(a). *See Peick*, 539 F. Supp. at 1051-52; *Textile Workers*, slip op. at 948. Our view of prospective legislation is, of course, quite different from the "disfavor of retrospective legislation" that lay at the core of *Shelter Framing*. 705 F.2d at 1512. We conclude, on balance, that the equities weigh in favor of the employees.

The final *Nachman* factor is whether the statute included provisions to limit and moderate the effect of the burdens it imposed. 592 F.2d at 962-63. The intervenors assert that the MPPAA has almost no moderating features. In a sense, they are correct. The statute does mitigate the effect of withdrawal liability to some extent by: a) limiting liability only to employers who voluntarily withdraw without a successor, 29 U.S.C. §§ 1384, 1390 & 1398, b) limiting the overall amount of withdrawal liability by a *de minimis* rule to eliminate the burden on small employers, 29 U.S.C. §§ 1389, 1405, c) permitting periodic installment payments of withdrawal liability, 29 U.S.C. § 1399(c), and d) allowing pension plans to fashion their own withdrawal rules, 29 U.S.C. § 1404. These provisions, however, may provide "little, if any, comfort

for the employers." *Shelter Framing*, 705 F.2d at 1514. Accordingly, we find the fourth *Nachman* factor to weigh against the MPPAA's constitutionality. On balance, however, the *Nachman* analysis reveals that the MPPAA is constitutional.

C. THE CONTRACT CLAUSE ISSUE.

The employers claim that the MPPAA retroactively impairs contractual relations in violation of the contract clause. *Alled Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). They argue that, like the statute struck down in *Allied*, the MPPAA grossly distorts employers' contractual obligations to their former employees by imposing obligations substantially beyond the terms of negotiated employment contracts.

Reliance on *Allied* is misplaced. In that case, the Supreme Court struck down as violative of the contract clause a Minnesota statute imposing pension fund liability on an employer. However, "a number of critical differences exist between the Minnesota statute and the MPPAA. Most significantly, *Allied* involved a state statute, not an act of Congress. The prohibition against impairing the obligation of contracts is directed against state statutes." *Textile Workers*, slip op. at 958. We find the MPPAA to pass contract clause muster.

D. REMAINING CONSTITUTIONAL CONTENTIONS.

Plaintiffs assert that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds. The argument is that it is improper to allow the PBGC to decide whether to pay unfunded vested benefits of plans that terminate before January 1, 1978. *See* 29 U.S.C. § 1181(c)(1) (repealed 1980). We find this issue moot since, as of July 1, 1980, the PBGC no longer has this discretionary power.

In the final pages of their Memorandum of Points and Authorities, intervenors raise several constitutional challenges to the MPPAA. They assert that the statute (a) involves a taking of property without a hearing, analogizing MPPAA withdrawal liability to a writ of garnishment, (b) fails to allow judicial participation prior to a seizing of property, (c) violates due process by giving the trustees' calculations of withdrawal liability a presumption of correctness, (d) deprives intervenors of a right to a jury trial, and (e) is unconstitutionally vague.

Intervenors were allowed to join in this litigation "on the condition that they do not litigate beyond the scope of plaintiffs' first amended complaint." *Connolly v. PBGC*, CV 75-2037 (C.D. Cal. 1982) (order granting intervention). The first amended complaint focuses on the MPPAA's disruption of existing collective bargaining relationships, and its alleged unconstitutional taking of property without compensation or rational basis. Nowhere in the complaint are there facts alleged which would support the additional procedural due process claims advanced by the intervenors. These contentions are hereby ordered stricken from the record. They are outside the confines of the first amended complaint and beyond the scope of permissive intervention.

CONCLUSION

Summary judgment is granted in favor of the defendant as to all of plaintiffs' and intervenors' facial constitutional challenges. We do not, however, resolve the constitutionality of the statutes as applied to particular parties. That issue, not raised by this lawsuit, is being litigated in another district.

SO ORDERED.

FOOTNOTE

[1] Our discussion of the legislative history of the MPPAA is adopted from the discussion set forth in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. December 19, 1983) (hereinafter "*Peick*").

The Clerk of the Court shall serve copies of this Order, by United States Mail, upon the attorneys of record for the parties appearing in this action.

Dated: April 25, 1984

DOROTHY W. NELSON
United States Circuit Judge
Sitting by Designation

DAVID W. WILLIAMS
United States District Judge

ROBERT J. KELLEHER
United States District Judge

ENTERED
DEC 4 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
DEC 3 1984
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THREE JUDGE COURT

JOHN L. CONNOLLY, et al., etc., Plaintiffs, vs. PENSION BENEFIT GUARANTY CORPORATION, Defendant, and WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC., Plaintiffs in Intervention.	No. CV 75-2037-DWW-DWN-RJK JUDGMENT

This Three-Judge Court having been duly convened to hear and determine substantial questions of constitutionality presented by this case, the motions of plaintiffs and plaintiffs-in-intervention for summary judgment came on regularly for hearing on October

24, 1983 in the above-entitled court, all parties appearing through counsel, and the court having considered all the pleadings and the stipulations on file and the oral arguments of counsel having found that there is no genuine issue of fact to be submitted for trial and having concluded that defendant is entitled to judgment as a matter of law, and the court having made and caused to be filed on May 1, 1984, its written Order Granting Summary Judgment To Defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Part I of Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. §§ 1381-1405] is hereby declared to be constitutional. Plaintiffs' assertions that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds are moot, since as of July 1, 1980, the PBGC no longer had this discretionary power.

2. §§ 4006 and 4007 of the Employee Retirement Income Security Act of 1974, as enacted in 1974 (29 U.S.C. §§ 1306, 1307, 88 Stat. 1010-1013), insofar as the terms thereof apply to multiemployer pension plans, are hereby declared to be constitutional.

3. Section 4006(a)(3)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)] is hereby declared to be constitutional.

4. The challenges of plaintiffs-in-intervention Woodward Sand Company, Inc.; Klema Engineering, Inc.; Municipal Engineers, Inc.; and Penfield & Smith, Inc. to the constitutionality of withdrawal liability as applied to them are not before this court.

5. The challenges of plaintiffs-in-intervention to the dispute resolution procedures of ERISA are not before the court. All

allegations in support of such challenges are struck from the record of these proceedings.

6. Defendant shall recover from plaintiffs its costs incurred during the pendency of this litigation and from plaintiffs-in-intervention its costs of the litigation of issues argued by plaintiffs-in-intervention.

DATED: This 30th day of November, 1984.

Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge

David W. Williams
DAVID W. WILLIAMS
Senior U. S. District Judge

Robert J. Kelleher
ROBERT J. KELLEHER
Senior U. S. District Judge

FILED
JAN 31 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, et al., Plaintiffs, vs. PENSION BENEFIT GUARANTY CORPORATION, Defendant.	THREE JUDGE COURT Civil Action No. 75-2037 DWW-DWN-RJK
WOODWARD SAND COMPANY, INC., et al., Plaintiffs-in-Intervention.	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Woodward Sand Company, Inc., plaintiff-in-intervention in the above-captioned case, for itself alone, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to Title 28, United States Code, Sections 1253, 2101.

DATE: January 29, 1985

LUCE, FORWARD, HAMILTON & SCRIPPS

By: 

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, et al., Plaintiffs, vs. PENSION BENEFIT GUARANTY CORPORATION, Defendant.	THREE JUDGE COURT Civil Action No. 75-2037 DWW-DWN-RJK CERTIFICATE OF SERVICE BY MAIL
WOODWARD SAND COMPANY, INC., et al., Plaintiffs-in-Intervention.	

I, Albert T. Harutunian III, a member of the Bar of the Supreme Court of the United States and counsel of record for Woodward Sand Company, Inc., appellant herein, hereby certify

that on January 29, 1985, pursuant to the Rules of the Supreme Court, I served a copy of the attached Notice of Appeal to the Supreme Court of the United States on each of the parties herein, by depositing such copies in the United States post office, San Diego, California, with first class postage prepaid, properly addressed to the post office address of the counsel listed below:

Peter H. Gould
Pension Benefit Guaranty Corporation
Legal Department
2020 K Street
Washington, D.C. 20006

Solicitor General
Department of Justice
Washington, D.C. 20530

Wayne Jett
Jett, Clifford & Laquer
3055 Wilshire Boulevard
Suite 420
Los Angeles, CA 90010

Mark Bennett
Merrill, Schultz & Wolds, Ltd.
1855 First Avenue
Suite 100
San Diego, CA 92101

All parties required to be served have been served.

DATE: January 29, 1985

By: 

ALBERT T. HARUTUNIAN III
Attorneys for Woodward Sand Company, Inc.
1700 Bank of California Plaza
110 West A Street
San Diego, CA 92101

ENTERED
DEC 15 1982
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

FILED
DEC 14
U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, et al., etc.,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,

Defendant.

WOODWARD SAND CO., INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Proposed Intervenors.

No. CV 75-2037-DWW

ORDER GRANTING INTERVENTION

Plaintiffs, trustees of a pension plan established pursuant to a collective bargaining agreement [Plan], are attacking the constitutionality of the Multi-Employer Pension Plan Amendments Act of 1980 [MPPAA], 29 U.S.C. §§ 1306, 1307 and 1381-1405. The MPPAA requires the Plan to pay termination insurance premiums to defendant Pension Benefit Guaranty Corporation [PBGC] which would cover the Plan if it is terminated without enough assets to pay out vested employee benefits. The MPPAA also states that employers who withdraw from any pension plan will incur withdrawal liability based upon their share of the plan's

unfunded vested benefits. Plaintiffs claim that the MPPAA violates the Fifth Amendment because it constitutes a taking without just compensation and interferes with the bargained-for organization of the Plan which limits an employer's liability to his own contributions.

The applicants seeking intervention [Applicants] are 4 former employer members of the Plan who are subject to sizeable withdrawal liabilities under the MPPAA. Applicants have all filed suits against the PBGC and the plaintiff trustees in United States District Court in the Southern District of California in San Diego seeking, among other things, to have the MPPAA declared unconstitutional as applied to them.[1] They now move to intervene as party plaintiffs in this action. Applicants assert that they may intervene as a matter of right under Fed.R.Civ.P. 24(a)(2) or, alternatively, that the court should grant them permissive intervention under Fed.R.Civ.P. 24(b)(2). Defendant PBGC opposes the intervention. Plaintiff trustees do not oppose the motion so long as the Applicants are limited to litigating issues within the scope of plaintiffs' First Amended Complaint.

The court denies Applicants' motion for intervention as of right, but grants their motion for permissive intervention.

Intervention as a Matter of Right

Under Rule 24(a)(2), a party may intervene in an action as a matter of right if he has

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[1] The names of these cases are as follows: *Woodward Sand Co., Inc. v. Operating Engineers Pension Trust*, Case No. 81-920-N(I); *Roy L. Klema Engineers, Inc. v. Operating Engineers Pension Trust, Pension Guaranty Corp.*, Case No. 82-370-N(1); *Municipal Engineers, Inc. v. Operating Engineers Pension Trust, Pension Benefit Guaranty Corp.*, Case No. 82-372-N(H); and *Penfield & Smith Engineers, Inc. v. Operating Engineers Pension Trust, Pension Benefit Guaranty Corp.*, Case No. 82-371-N(I).

> an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

Plaintiffs' First Amended Complaint is a broad attack on the facial constitutionality of the MPPAA and does not address any specific application of the legislation. Specifically, ¶¶ 27-29 of the complaint allege that the MPPAA "take[s] the property of each withdrawn employer for the private use and benefit of the [Plan] . . . in violation of the Fifth Amendment," without "just and adequate compensation," and "without the due process of law." The relief sought by the complaint is merely a declaratory judgment that the MPPAA is unconstitutional and therefore "null and void." Thus, Applicants' "interest" in this action under Rule 24(a)(2) is no greater than any other employer subject to withdrawal liability under the MPPAA.

What makes Applicants' position unique, however, is that their San Diego lawsuits could be impaired by the *stare decisis* effect of the instant action. In particular, Applicants are concerned that this case, being before a 3 Judge Court, will be appealed directly to the Supreme Court well before their San Diego cases. Applicants point to the language of Rule 24(a)(2) and argue that an adverse Supreme Court ruling in this case would "as a practical matter impair [their] ability to protect [their] interests."

The circuits are divided on the question of whether the possible *stare decisis* effect of a case requires intervention as a matter of right. The 5th Circuit only grants intervention if the applicant has a direct interest in the identical property which is the subject of the action. *Atlantis Development Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967). The 2d and 10th Circuits are more willing to accept *stare decisis* as the basis for intervention as a right without such an identity of interest. *Compare NY PIRG v.*

Regents, 516 F.2d 350, 353 (2d Cir. 1975) *with National Resources Defense Council v. NRC*, 578 F.2d 1341, 1345 (10th Cir. 1978).

In *Blake v. Pallan*, 554 F.2d 947 (9th Cir. 1977), the California Commission of Corporations attempted to intervene in an action by the SEC against certain securities brokers. One argument the California Commission made was that the *stare decisis* effect of the federal case would impair its ability to prosecute the defendants under state law. In ruling against intervention, the 9th Circuit attempted to measure the actual effect that an acquittal of the defendants would have on the applicant. The court noted that there was no identity of property interests as existed in *Atlantis Development Corp., supra*, and also observed that the applicant was not limited to the federal courts in protecting its interests. Finally, the court remarked that there would be no *stare decisis* effect at all if the federal case did not reach judgment before the state prosecution.

Following the *Blake* approach, we also note that, unlike *Atlantis Development Corp., supra*, this is not a case determining specific property interests in such a way as to foreclose any further claims to the property. Moreover, there are other cases challenging the MPPAA's constitutionality which could reach the Supreme Court before this case. Two of these cases are scheduled for oral argument before the 9th Circuit this month. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, Appeal No. 82-5460 and *G & R Roofing Co. v. Carpenters Pension Trust for Southern California*, Appeal nos. 82-5461 and 82-5462.

Even assuming that the instant case will be reviewed by the Supreme Court before any others, a ruling by the Court that the MPPAA is constitutional on its face, *i.e.*, rationally designed to protect employees' vested pension benefits by imposing reasonable retroactive liabilities on employers, *See Nachman Corp. v. PBGC*, 592 F.2d 947, 958-61 (7th Cir. 1979), would not eliminate Applicant's claims that the MPPAA is unconstitutional as applied to them. Finally, if Applicants are granted intervention as a matter

of right, there is no reason why every other plaintiff challenging the MPPAA would not have an equal right to intervene in this action.

For these reasons, this court is not prepared to grant Applicants intervention under Fed.R.Civ.P. 24(a)(2).

Permissive Intervention

Rule 24(b)(2) allows the trial court, in its discretion, to grant permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common," unless the intervention would cause undue prejudice or delay. The constitutionality of the MPPAA is such a common question of law. The court does not believe that the intervention will result in undue delay because Applicants have stated that they contemplate no further discovery and the PBGC is already familiar with Applicants' claims from the San Diego litigation.

Finally, Applicants' presence in this action will advance judicial economy and aid in the progress of the trial. Applicants have agreed to stay their San Diego cases if they are permitted to intervene in this case. Furthermore, as Applicants have a more direct financial stake in the outcome of this litigation, (it is they who will have to pay the withdrawal charges, not plaintiff trustees), their presense will help clarify the issues and make the case more concrete.

Applicants' motion for Intervention as a matter of right under Rule 24(a)(2) is DENIED. Applicants' motion to permissively intervene under Rule 24(b)(2) is GRANTED on the condition that they do not litigate beyond the scope of plaintiffs' First Amended Complaint.

IT IS SO ORDERED.

DATED: This 14 day of December, 1982.

/s/
DAVID W. WILLIAMS
Senior United States District Judge